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NO. ———

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

BROWN MARTIN NOEL,
HOWARD NEWTON DONNELLY,
HAROLD ANCEL THORNBERRY,

and

HARRY NORMAN SEITER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. WERE PETITIONERS, BROWN MARTIN NOEL AND HOWARD NEWTON DONNELLY, DEFENDANTS-APPELLANTS BELOW, ENTITLED TO A TRIAL BY A JURY SELECTED FROM A REASONABLE REPRESENTATIVE CROSS SECTION OF THE DISTRICT WHEREIN THEY WERE BEING TRIED?

II. FACTS ADDUCED AT TRIAL CONCLUSIVELY SHOW THAT THE JURY SELECTED TO TRY PETITIONERS WAS NOT COMPOSED OF A REASONABLE CROSS SECTION OF THE DISTRICT WHEREIN THEY WERE TRIED.

III. DENIAL OF PETITIONERS TO A TRIAL BY A JURY SELECTED FROM A REASONABLE REPRESENTATIVE CROSS SECTION OF THE DISTRICT WHEREIN THEY WERE TRIED VIOLATED THEIR CONSTITUTIONAL RIGHTS.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

The trial of the Petitioners herein was held in the City of London, Kentucky, a reasonably small town lying in Laurel County, some short distance from the Tennessee border. The trial was moved from Covington, Kentucky, which is a town lying on the Ohio River and just across the river from the City of Cincinnati, Ohio. The distance be-

tween London and Covington is some two hundred miles, London being located in what is commonly known as Appalachia and Covington being located almost adjacent to and a part of the Greater Cincinnati commercial market area. Some historians have pointed out that the bulk of the population in the Ohio River Valley is composed of German and Irish extraction, while those in Appalachia, especially in and around London, Kentucky, are mostly English stock, having crossed the mountains into that area from Virginia. At any rate, the way of life, emotional composure of individuals and moral fibre and religious instincts are entirely different.

After the trial was moved from the Covington docket to the London docket by the presiding judge of the United States District Court for the Eastern District of Kentucky, over the objections of these two Petitioners, all of the Defendants joined these two Petitioners in the following motion: That the entire panel from which a jury was to be selected to try these Petitioners be stricken for the reasons set out in the motion, and, secondly, said motion provided as follows: This motion was made before the trial commenced, was insisted upon during the trial and was made one of the salient features in the argument in the Sixth Circuit Court of Appeals to which the case was appealed. The reasons for the motions were specifically set out in the second part of said motion and are as follows:

> "Secondly, if the Court feels that the Eastern District of Kentucky is one district, then said defendants are entitled to a trial by *a jury selected from the entire district* which of necessity then would include people on the jury from the Covington judicial area. It denies defendants the right to be tried by a jury of their own vicinage or a jury of their peers and to require them to be tried by a jury selected from

the London judicial area, consisting of Bell, Clay, Harlan, Jackson, Knox, Laurel, Leslie, McCreary, Owsley, Perry, Pulaski, Rockcastle, Wayne and Whitley did violate their constitutional rights and deny each of said defendants a fair trial. The area in the London judicial district is entirely composed of people of different origin and background; different modes of livelihood, different religious beliefs and probably with a certain *ALIEN FEELING AGAINST FOREIGNERS.*" (Emphasis added.)

The Court promptly overruled the motion to strike the panel from which a jury was finally selected to try these Petitioners. It is not denied that no member of the panel and no member of the jury finally selected to try the case resided, lived in or was in any manner connected with the several counties surrounding the city of Covington, Kentucky. There is no claim by the government that the appellants were tried by a jury selected from a reasonable representative cross section of the Eastern District of Kentucky and it had previously been judicially determined that the Eastern District of Kentucky contained no divisions like other federal jurisdictions had been divided into divisions within the meaning of the Constitution.

ARGUMENT

I. THE DEFENDANTS WERE DENIED THEIR SIXTH AMENDMENT RIGHT TO A FAIR TRIAL.

Amendment VI of the Constitution of the United States provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and *district* wherein the crime shall have been committed, which *district* shall have been previously ascertained by law * * *" (Emphasis added)

Article III, Section 2, Paragraph 3, provides:

> "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed."

28 U.S.C. 114 provides:

> "All prosecutions for crimes or offenses shall be had within the division of such district where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the case to be transferred for prosecution to another division of the district.
>
> The word 'prosecutions' as used in this statute, does not include the finding and return of an indictment. The prevailing practice of impanelling a grand jury for the entire district at a session in some division and of distributing the indictments among the divisions in which the offenses were committed is deemed proper and legal, *Salinger* v. *Loisel*, 265 U.S. 224, 237. The Court stated that this practice is 'attended with

real advantage'. The rule is a restatement of existing law and is intended to sanction the continuance of this practice. For this reason, the rule requires that only the trial be held in the division in which the offense was committed and permits other proceedings to be had elsewhere in the same district.

Within the framework of the foregoing constitutional provisions and the provisions of the general statute, *28 U.S.C. 114, supra,* numerous statutes have been enacted to regulate the venue of criminal proceedings, particularly in respect to continuing offenses and offenses consisting of several transactions occurring in different districts, *Armour Packing Co.* v. *United States,* 200 U.S. 56, 73-77; *United States* v. *Johnson,* 323 U.S. 273. These special venue provisions are not affected by the rule." Source: Notes to Rules of Criminal Procedure, Rule 18.

It must not be overlooked that by successive joint Court orders attached to the Motion, the district is divided into places and times of court and assigns jury selection from designated counties adjacent to or near the town where the Court sits. These judicial orders were attached to and made a part of the motion of appellants requesting the Court to quash the jury panel that had been summoned to court from which the jury was to be selected. These judicial orders allocating certain counties to certain places of trial constitute the *vehicle* on which the prosecution travels in order to prevent the defendants in a criminal prosecution from having a jury chosen from a representative "fair cross section of the community." This violates the Constitutional right of a defendant to be tried by a jury selected from a jury list or panel which is representative of a fair cross section of the community. [emphasis added]

The case of *U.S.* v. *Lewis,* 504 F.2d 92 (1974), held

that the statute specifying eight locations in the Eastern District of Kentucky for the holding of Court does not create divisions in the Eastern District. *18 U.S.C.A. § 3240*; *28 U.S.C.A. § 97(a)*. In this case, the Court held in effect that the Eastern District of Kentucky constituted one district as that word is used in the Statute, as well as in the Criminal Rules of Procedure and Judicial Decisions.

The Supreme Court of the United States in the case of *Taylor* v. *Louisiana*, 419 U.S. 522, 42 L.Ed. 690, 95 S.Ct. 692 at Pages 696 through 698, succinctly states that the Sixth Amendment by reason of the Fourteenth Amendment is binding on the states and that any infringement or denial of a defendant of a trial by a jury selected from *a fair cross section* of the district violates their Constitutional right. [emphasis added]

We quote and emphasize the Supreme Court in *Taylor* v. *Louisiana* as follows:

> "The background against which this case must be decided includes our holding in Duncan v. Louisiana, 391 U.S. 145, 20 L.Ed. 492, 88 S.Ct. 144 (1968), that the Sixth Amendment's provision for jury trial is made binding on the States by virtue of the Fourteenth Amendment. Our inquiry is whether the presence of a *fair cross section of the community on venires, panels, or lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions.* (Emphasis added).
>
> The Court's prior cases are instructive. Both in the course of exercising its supervisory powers over trials in federal courts and in the constitutional context, the Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community. A unanimous Court stated in Smith v. Texas, 311 U.S.

128, 130, 85 L.Ed. 84, 61 S.Ct. 164 (1940), that "(i)t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." To exclude racial groups from jury service was said to be "at war with our basic concepts of a democratic society and a representative government." A state jury system that resulted in systematic exclusion of Negroes as jurors was therefore held to violate the Equal Protection Clause of the Fourteenth Amendment. Glasser v. United States, 315 U.S. 60, 85-86, L.Ed 680, 63 S.Ct. 457 (1942) in the context of a federal criminal case and the Sixth Amendment's jury trial requirement, stated that "(o) ur notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government," and repeated the Court's understanding that the jury "be a body truly representative of the community" . . . and not the organ of any special group or class.

A federal conviction of a jury from which women had been excluded, although eligible for service under state law, was reviewed in Ballard v. United States, 329 U.S. 187, 91 L.Ed. 181, 67 S.Ct. 261 (1946). Noting the federal statutory "design to make the jury 'a cross section of the community' " and the fact that women had been excluded, the Court exercised its supervisory powers over the federal courts and reversed the conviction. In Brown v. Allen, 344 U.S. 443, 474, 97 L.Ed. 469, 73 S.Ct. 397 (1953), the Court declared that "(o) ur duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a *cross section* of the population suitable in character and intelligence for that civic duty." (Emphasis added).

Some years later in Carter v. Jury Comm'n, 396 U.S. 320, 330, 24 L.Ed.2d 549, 90 S.Ct. 518 (1970), the

Court observed that the exclusion of Negroes from jury service because of their race "contravenes the very idea of a jury — 'a body truly representative of the community' . . . ." (Quoting from Smith v. Texas, supra). At about the same time it was contended that the use of six man juries in noncapital criminal cases violated the Sixth Amendment for failure to provide juries drawn from a cross section of the community, Williams v. Florida, 399 U.S. 78, 26 L.Ed.2d 446, 90 S.Ct. 1893 (1970). In the course of rejecting that challenge, we said that the number of persons on the jury should "be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community." Id., at 100, 26 L.Ed.2d 446. In like vein, in Apodaca v. Oregon, 406 U.S. 404, 410-411, 32 L.Ed.2d 184, 92 S.Ct. 1628 (1972) (plurality opinion), it was said that "a jury will come to such a (commonsense) judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate . . . on the question of a defendant's guilt." Similarly, three Justices in Peters v. Kiff, 407 U.S., at 500, 33 L.Ed.2d 83, 92 S.Ct. 2163, observed that the Sixth Amendment comprehended a fair possibility for obtaining a jury constituting a representative cross section of the community.

The unmistakable import of this Court's opinions, at least since 1940, Smith v. Texas, supra, and not repudiated by intervening decisions, *is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.* Recent federal legislation governing jury selection within the federal court system has a similar thrust. Shortly prior to this Court's decision in Duncan v. Louisiana, supra, the Federal Jury Selection and Service Act of 1968 was enacted. In that Act, Congress stated "the policy of the United States that all litigants in Federal courts

entitled to trial by jury shall have the right to grand and petit juries selected at random from a *fair cross section* of the community in the district or division wherein the court convenes." 28 U.S.C. § 1861 (28 U.S.C.S. § 1861). In that Act, Congress also established the machinery by which the stated policy was to be implemented. 28 U.S.C. §§ 1862-1866 (28 U.S.C.S. §§ 1862-1866). In passing this legislation, the Committee Reports of both the House and the Senate recognized that the jury plays a political function in the administration of the law and that the requirement of a jury's being chosen from a *fair cross section* of the community is fundamental to the American system of justice. Debate on the floors of the House and Senate on the Act invoked the Sixth Amendment, the Constitution generally, and prior decisions of this Court in support of the Act. (Emphasis added).

We accept the fair cross section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power — to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. Duncan v. Louisiana, 391 U.S., at 155-156, 20 L.Ed.2d 491, 88 S.Ct. 1444. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, instictive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage, but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. "Trial by jury presupposes a jury drawn

from a pool broadly representative of the community as well as impartial in a specific case. . . . (T) he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." Thiel v. Southern Pacific Co., 328 U.S. 217, 227, 90 L.Ed. 1181, 66 S.Ct. 984, 166 A.L.R. 1412 (1946) (Frankfurter, J., dissenting). (Emphasis added.)

II. THE JURY SELECTED TO TRY PETITIONERS WAS NOT SELECTED FROM A REASONABLE REPRESENTATIVE CROSS SECTION OF THE DISTRICT WHEREIN SAID PETITIONERS WERE TRIED.

The rule has been followed in *Duren* v. *Missouri*, 439 U.S. 357, 58 L.Ed.2d 579, 99 S.Ct. 664. The rule is firmly embodied in Constitutional Law and a defendant being tried on a criminal charge in the federal court has as one of his Constitutional rights to have the jury panel from which the jury is selected to be chosen from a fair cross section of the community or district in which the alleged offense was committed. The alleged offense occured in Covington, Kentucky.

Let's now turn our attention to the facts of the case to see whether or not the Constitutional rights of the appellants were violated. The court order filed July 5, 1978, by the three sitting judges in the Eastern District divided into jury divisions for the purpose of carrying out the functions of the district court the following counties from which trials of criminal prosecutions would be conducted at London, Kentucky. The counties as revealed by the order are the following counties with the populations set opposite their names:

Bell	31,087
Clay	18,481
Harlan	37,370
Jackson	10,005
Knox	23,689
Laurel	27,286
Leslie	11,623
McCreary	12,548
Owsley	5,025
Perry	25,714
Pulaski	35,234
Rockcastle	12,305
Wayne	14,268
Whitley	24,125
Total	288,878

The population of the counties from which the panel of prospective jurors were chosen represent a total of 288,-278 inhabitants. This subtracted from the total population of the Eastern District, representing one district under *Lewis, supra,* leaves the balance of 1,210,434 people that were excluded from jury duty at the trial of these defendants indicating substantially that they were denied a trial by a "cross section" of the Eastern District as guaranteed them by the Constitution of the United States. Defendants contend that the London division of the district is an agricultural, rural and mining oriented area of the state. The Eastern District of which Ashland, Covington, Newport and Lexington are a part, is urban in nature, but the population of these areas was excluded from jury duty in this case. The panel from which the jury was selected was drawn from only 19.2% of the district's population. It was a denial of the defendants' Sixth Amend-

ment rights to exclude 100% of the population of their home area from the panel, and 80.8% of the remainder of the district effectively precluding them from a trial of their peers, or in other words, the jury panel from which the jury was selected that tried these appellants was not chosen from a "cross section" as required by the Constitution.

According to the 1970 County Census as published in the 1980 State Directory of Kentucky, compiled by Larry M. Wright at page 177, the population of the sixty-seven counties of the Eastern District is 1,499,312. The fourteen counties from which this jury venire was summoned resulting in the jury that tried appellants totals only 288,878 persons. When you consider this in the light of existing facts that the place where the alleged crime occurred, to-wit, Covington, Kentucky, being a portion of the Northern Kentucky area of the Eastern District of Kentucky, has for many years been known nationally as a complex or liberal community; whereas, the counties from which the jury panel was summoned to try these appellants are just as widely known as "Bible packing people" alienated from city life, rural in nature, and as said in the motion filed by the appellants to strike the panel, have a certain alien feeling against foreigners. If the Eastern District of Kentucky is one district as judicially determined by this Court, consisting of 1,4'9,312 people, and if appellants are entitled to a cross section of that district, their Constitutional right to have a jury trial by jurors selected from a cross section of the district has been violated for the reason that said jury came from a panel made up from rural counties totalling only 288,878 persons.

We can also look at the distance in miles, mode of livelihood existing between the jury that tried appellants and the place where the alleged offense took place. The ap-

pellants say that if the Eastern District of Kenutcky is one district, then give them a jury representative of a cross section of said district. The court order allowing these appellants and compelling them to be tried from a jury foreign to their habitat, mode of living, religion and otherwise does in fact violate their Constitutional right to have a jury from a cross section of the district wherein the alleged offense was committed.

III. PETITIONERS WERE DENIED THEIR CONSTITUTIONAL RIGHTS AS MADE AND PROVIDED FOR IN ARTICLE III, SECTION 2 AND AMENDMENT VI, UNITED STATES CONSTITUTION.

Appellants contend that their Constitutional right to have a jury selected from a fair representative cross section of the district has been violated. As held in the case of *Jackson* v. *Comm. of Ky.*, 291 S.W. 983, the Constitution guarantees and the law mandates that a jury be composed of the vicinage of the accused. Appellants were denied this in this trial. Therefore, this Court should reverse the verdict and judgment of the court on this one single issue alone and should direct a new trial.

To prove in this case exactly what appellants are now urging upon this court we look at the record to see what occurred at the conclusion of the trial and after the instructions of the court, the jury retired to deliberate a verdict at 10:42 a.m., Tr.R. Vol. 22, page 3733 Within thirteen minutes the jury returned into the court room with two questions at the hour of 10:55 a.m. The court advised that it had a note from the jury and after determining that all interested parties were present in court, the court stated that the first question being asked by the

jury was: "If at all possible, we would like to know when and how Captain Al Meyer died." Said Meyer being a witness for the prosecution.

This question and another question, to both of which the attorneys objected, is fully revealed on pages 3734, 3735, 3736 of Tr.R. Vol. 22 and show that what happened in open court was highly prejudicial and most damaging to appellants. Counsel for appellants insisted that the court advise the jury that Al Meyer died from natural causes which the court refused. The series of events taking place as disclosed by the record shows that the jury within thirteen minutes of deliberation assumed that Al Meyer, who was a policeman for the City of Covington and deceased at the time of trial, had been put away by illegal means or killed and appellants feel that the jury largely turned on this event in reaching its quick verdict. Other arguments relating to the introduction of an Al Meyer tape will be covered in another brief. The writer only mentions it here to prove that this jury had in their minds within thirteen minutes of deliberation that these appellants had something to do with the death of Captain Al Meyer and that he met his death by unlawful means. The Court refused to correct this serious prejudicial error, but for the purposes of this brief we state to the Court that the prejudicial and ill feeling by the Jury selected from Appalachia was strong and the hate was livid.

IV. THE SIXTH CIRCUIT COURT OF APPEALS IGNORED THE QUESTION PRESENTED TO THE TRIAL COURT BY THE PETITIONERS HEREIN FOR REASONS KNOWN ONLY TO THE COURT.

See appendix.

The Petitioners, Brown Martin Noel and Howard Newton Donnelly, adopt by reference the arguments and issues of co-petitioners, Harold Ancel Thornberry and Harry Norman Seiter, as set out in their Petitions for Writ of Certiorari. Rule 28 of the Federal Rules of Appellate Procedure permits a Defendant-Appellant to adopt, by reference, any part of the Brief of a co-defendant.

CONCLUSION

For the reasons stated above, it was reversible Constitutional error to deprive Appellants of a jury selected from a representative cross section of the Eastern District of Kentucky. The prosecution, like the 6th Circuit Court of Appeals, have thus far ignored this Constitutional right, upon which all Petitioners have relied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of May, 1981, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Hon. ~~Eldon Webb~~ Patricia H. Molloy, United States Attorney, 326 Post Office Building, P. O. Box 1490, Lexington, Kentucky 40501, and to Solicitor General, Department of Justice, Washington, D. C. 20530. I further certify that all parties required to be served have been served.

Howell W. Vincent

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 78-5508, 78-5509, 78-5510, 78-5511, 80-5048

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HAROLD ANCEL THORNBERRY (78-5508, 80-5048),
HARRY NORMAN SEITER (78-5509, 80-5048),
HOWARD NEWTON DONNELLY (78-5510, 80-5048),
BROWN MARTIN NOEL (78-5511, 80-5048),

Defendants-Appellants.

ORDER

(Filed February 24, 1981)

BEFORE: LIVELY, BROWN and JONES, Circuit Judges.

Brown Martin Noel, Howard Newton Donnelly, Harold Ancle Thornberry, and Harry Norman Seiter appeal their convictions for conspiring to obstruct enforcement of criminal laws of the Commonwealth of Kentucky with intent to facilitate an illegal gambling business in violation of 18 U.S.C. § 1511.

From January 1977 until March 23, 1978, a nightly poker game was played at 616 Washington Street. The apartment was owned by Thornberry and rented to Noel's

wife. Many different people gambled in the game. The windows of the apartment were boarded over and the door had a peephole to examine the entrants. Poker was played with a two-dollar opener and a two-dollar limit on raises.

The game had a regular dealer who did not play in the game. Two or three dealers worked in shifts each evening. Noel or Brown answered the door and telephone and prepared food and beverages for the players. One player testified that Donnelly told him the game was protected and wouldn't get raided without his getting a warning.

During the game, quarters would be cut from the pot and placed in a cigar box by the dealer. The average pot was $40.00 to $100.00; the percentage cut was up to 15 percent. The pots were cut for the benefit of Noel and Donnelly, which makes the game illegal under state law.

The Chief of Detectives in Covington is in charge of gambling investigations. In January 1978, Harry Seiter was promoted to Chief of Detectives.

Seiter used his position as Chief of Detectives to warn the other defendants of investigations and close down competing games. He received payoffs in return. Two witnesses testified about this.

Jerome Wardia testified that Donnelly told a group of people that he sent Seiter to close down a competing card game. He also testified that Donnelly told him he was paying Seiter $100.00 to "keep the heat off" and that he saw Donnelly give Seiter $100.00 in cash.

Phillip Pointer testified that he saw Seiter and Donnelly together and that Seiter put a large wad of money in his pocket and said "the boys will be happy with this." He also testified that he saw Donnelly hand Thornberry some large bills.

James Thomas, a paid FBI informant, testified and presented tape recordings he made of conversations with Thornberry. Thomas testified that in March 1978, Thornberry said he had the Police Department in his pocket, that he would get Harry Seiter made Police Chief, that he had paid for promotions of unnamed Covington police and fire officers, that he had gotten the Commissioners elected and that he had gotten Seiter promoted to Captain. Thornberry said that Donnelly and Noel were paying him $450.00, in addition to his rent, which he used to pay off the Commissioners plus three policemen.

In March 1978, the FBI placed informants in the game. The Chief of Police was told about this, but Seiter, then newly promoted as Chief of Detectives, was not informed.

On March 30, 1978, the FBI and Covington Police searched 616 Washington Street. They had a search warrant. Before the search they asked Thornberry for a key, but he said he didn't have one. After the search the agents took the return on the warrant to Thornberry, who said he would give it to Mary Ann Noel.

Seiter was not informed of the raid until it was over, when he went to meet with Thornberry. Thornberry told Seiter about the raid and that he had been subpoenaed and had to appear before a grand jury.

The United States charged the defendants with conspiring to obstruct enforcement of the criminal laws of the Commonwealth of Kentucky. After a five-week trial, all the defendants were convicted.

In this appeal, the defendants contend that the district court erred in permitting the Government to call the card game's dealers to the stand knowing they intended to invoke their Fifth Amendment privilege. The district court noted that if the dealers testified their testimony would

not be wholly cumulative and that the jury might wonder why the dealers were not called. In this case, the Government had "an honest belief that the witness[es] [had] information which is pertinent to the issues in the case and which is admissible under applicable rules of evidence, if no privilege were claimed." *United States* v. *Compton*, 365 F.2d 1, 5 (6th Cir.) *cert. denied* 385 U.S. 956 (1966); *see also, United States* v. *Vandetti*, 623 F.2d 1144 (6th Cir. 1980). There was no error here.

The defendants assert that the district court erred because it did not answer the jury's question about Captain Al Meyer's cause of death. Nothing in the record revealed how Meyer died. The court instructed the jury:

> The second, well, actually the first question asked, that is, 'If at all possible we would like to know when and how Captain Al Meyer died.' I want to advise you that that is not in the record in this case and, therefore, you are not to speculate on when and how he did die. It has not been put into evidence and so Instruction No. 3, which I gave to you, in your instructions you have, is that, 'You are to decide this case solely on the evidence submitted here in court.' And that's all that we can advise you of on that.

This instruction was proper and the defendants were not prejudiced by the court's response.

The prosecutor's closing argument was not "so egregious so as to render the entire trial fundamentally unfair." *Cook* v. *Bordenkircher*, 602 F.2d 117, 119 (6th Cir. 1979). The defendants' assertions that prejudicial statements made by the prosecutor amounted to reversible error are without merit given the overall tone of the advocacy.

We have examined the other contentions made by the defendants in this appeal from their convictions and find they are without merit. (Omitting the cross section jury argument) (added comment.)

The district court did not abuse its discretion in denying the defendants' motion for a new trial. It heard the evidence and concluded that it was "not reasonably well satisfied that the testimony given at trial by Wardia was false."

AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

EXCERPTS FROM TRANSCRIPT OF EVIDENCE

VOLUME I

ORAL MOTION

* * *

[2] MR. VINCENT: Your Honor, I would like to approach the bench if I may. I have a motion to make and then I want the privilege of reducing it to writing before trial starts.

THE COURT: Do you want to make it from there?

MR. VINCENT: No, I would rather approach the bench I think.

THE COURT: All right, come up.

(The following occurred at the bench in the immediate presence of counsel and the Court;)

[3] MR. VINCENT: The Defendant Brown Martin Noel moves the Court to enter an order striking the entire panel of proposed jurors selected to try this case for the following reason: That by judicial order the Eastern District of Kentucky has been divided into several districts or docket areas wherein the Court has been scheduled to sit on specific days, and each sitting of the Court has been ascribed or made jurisdiction over a few counties in close proximity to the place where the Court is to sit. For instance, at Cattletsburg, the jurisdiction of the Court is limited to a few counties adjoining Boyd County. The Court sitting at Covington, Kentucky, has been restricted to a few counties adjacent to or in close proximity to Covington. And I notice from this list of proposed jurors that the Court here at London has selected jurors from a few

counties in close proximity to the City of London. By reason of the Court order affixing these docket places where Court should sit in the Eastern District of Kentucky, they have in fact established districts within the Eastern District of Kentucky and in *United States* v. *Combs* and subsequent cases say that the Eastern District of Kentucky is one [4] district, the Court order signed by Judge Hermansdorfer, Judge Moynahan, and Judge Swinford actually has divided the Eastern District into districts for the purpose of carrying out the functions of the District Court.

It is the defendants' contention that the Court order signed by the Judges sometime back, which I am sure the Court is familar with, is tantamount to Congress dividing the Eastern District of Kentucky into districts for all practical purposes and intents.

The Defendant Brown Martin Noel objects to this panel of prospective jurors for the reason that it is restricted to a few counties in close proximity to the City of London, Kentucky, and does not contain any prospective jurors from the docket area of Covington, site of the District Court.

Therefore, the Defendant Brown Martin Noel will if tried by this prospective jury, or a jury selected from the list of prospective jurors, will be denied his constitutional right to have his trial had in a district where the alleged offense occurred and he will be denied his right to a jury of his vicinage, or a jury of his peers, as ascribed in the Constitution, and the subsequent [5] cases interpreting that section of the constitutional rights.

To require Brown Martin Noel to go to trial at a foreign sitting of the District Court from his place of residence and from the place where the alleged offense occurred will deny to Brown Martin Noel his constitutional

right to be tried in the district where the alleged offense occurred and deny him a right to a trial by a jury of his vicinage or a jury of his peers.

This is covered by the criminal rules, and I suggest to the Court the way Judge Hermansdorfer answered this argument was that in a trial that I had in front of him, he had a jury selected – if the Court maintains that the Eastern District is one district as set out in the case of *United States* v. *Combs,* which I am familiar with, then we are entitled to have a jury from the entire district, and that is the way Judge Hermansdorfer got around this motion once before, by summoning the entire panel of prospective jurors from the entire district.

To move a case from Covington docket to the London docket and then to restrict the selection of the prospective jurors from a limited area in close proximity to the City of London, which is 190 [6] to 200 miles distant, we feel is denying the Defendant Brown Martin Noel a fair trial. And I would like the right, Judge, to reduce my motion to writing and file it before the trial starts, and I am submitting that to the Court.

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CRIMINAL NO. 78-26

UNITED STATES OF AMERICA,

PLAINTIFF

vs.

BROWN MARTIN NOEL, ET AL.,

DEFENDANTS

MOTION

Defendants, Brown Martin Noel, Howard Donnelly, Harry Seiter, jointly and severally, move the Court to enter an Order disqualifying and cancelling the entire panel of prospective jurors from which a jury will be chosen to try the innocence or guilt of said defendants on the charge set forth in Count 3 of the indictment herein in the above styled cause.

In support of this motion, the defendants state that heretofore the District Court and the Sixh Circuit Court of Appeals at Cincinnati, Ohio have ruled that the Eastern District of Kentucky is one district. Defendants contend this ruling is improper since said ruling is based on the assumption that Congress did not divide the Eastern District of Kentucky into several districts for the holding of Court.

Defendants contend that pursuant to Section 138, Title 28 of the U. S. Code as amended delegated the authority to divide the Eastern District of Kentucky into several districts was granted.

Originally, under order of the two then existing district courts by order entered December 18, 1970, the Eastern District of Kentucky was, in effect, divided into several places of holding court and the order states that said division was in compliance with Public Law 90-263, approved June 28, 1968. A copy of said order is attached hereto and made a part hereof the same as if set out in full herein. To further give effect to the order entered December 19, 1970, the Court entered a further order on December 15, 1972, moving various cases from various counties within the district to a particular docket section within the eastern district. A copy of said order is attached hereto and made a part hereof the same as if set out in full herein.

A further order was entered by the three presiding judges of the various districts within the Eastern District of Kentucky, namely, Bernard T. Moynahan, Jr., Chief Judge, H. David Hermansdorfer, Judge, and Eugene E. Siler, Jr., Judge, on July 5, 1978, by taking certain counties from one of the judicial areas previously assigned to a particular court city, either at Catlettsburg, Covington, Frankfort, Lexington, London and Pikeville, and adding certain other counties to the judicial area of said court city. A copy of said order entered July 5, 1978, is hereto attached and made a part hereof the same as if set out in full herein.

Defendant contends as they have since the inception of this trial as follows: (1) That the Court committed reversible error and denied the defendant's constitutional rights in moving the trial of this cause from the Coving-

ton judicial area as fixed by court order, to the London court area, and; (2) In failing to select a jury from the whole district of the Eastern District of Kentucky as more fully appears from counsel's argument at a pretrial session of the District Court at London on this the 16th day of October, 1978, as will more fully appear from the official court reporter's transcript.

In other words, defendants contend that the constitution guarantees them the right to be tried in the Covington judicial area consisting of Boone, Bracken, Campbell, Gallatin, Grant, Kenton, Mason, Pendleton and Robertson counties, as guaranteed by the Constitution and the Criminal Rules of Procedure and, secondly, if the Court feels that the Eastern District of Kentucky is one district then said defendants are entitled to a trial by a jury selected from the entire district which of necessity then would include people on the jury from the Covington judicial area. The Court's ruling denies defendants the right to be tried by a jury of their own vicinage or a jury of their peers and to require them to be tried by a jury selected from the London judicial area, consisting of Bell, Clay, Harlan, Jackson, Knox, Laurel, Leslie, McCreary, Owsley, Perry, Pulaski, Rockcastle, Wayne and Whitley which would violate their constitutional rights and deny each of said defendants a fair trial. The area in the London judicial district is entirely composed of people of different origin and background; different modes of livelihood, different religious beliefs and probably with a certain alien feeling against foreigners.

WHEREFORE, defendants request that this motion be sustained and that the case be reassigned to the Covington docket or judicial area or that it be continued, in the al-

ternative, until a jury can be summonsed from the entire Eastern District of Kentucky and for all proper relief.

/s/ HOWELL W. VINCENT
Attorney for Brown Martin Noel

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Richard Slukich, Attorney for
Howard Donnelly

.....

Ron Parry, Attorney for
Harry Seiter

EXCERPTS FROM DOCKET ENTRIES

Date	Document No.	PROCEEDINGS
		• • •
10/16/78	147.	MOTION by Defts. Noel, Donnelly and Seiter for Order disqualifying & canceling the entire panel of prospective jurors filed.
		• • •
10/23/78	148.	ORDER: sig. fil. 10-16-78; ent; Mot. of defts. Noel, Donnelly & Seiter for order striking entire panel OVERRULED. Defts. granted leave to reduce oral mot. to writing for presentation to the Court before the beginning of trial. Renewed Mot. of Deft. Seiter to Dismiss OVERRULED. Mots. of defts. Noel, Donnelly & Thornberry to Dismiss on grounds of double jeopardy OVERRULED. Renewed Mot. of defts. Noel & Thornberry to Suppress portions of tape recordings to be reviewed by the Court. Renewed Motion in Limine by all defts. OVERRULED. Copies as noted.
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